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In the

# Supreme Court of the United States

..... Term 1974

No. ....73 - 1803

MARION MURTAGH and WILLIAM JOSEPH POWELL,
*Petitioners*

*v.*

UNIVERSITY COMPUTING COMPANY,
a Texas Corporation, et al,
*Respondents*

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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MARION MURTAGH and WILLIAM JOSEPH POWELL,
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*v.*

UNIVERSITY COMPUTING COMPANY,
a Texas Corporation, et al,
*Respondents*

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

The Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 6, 1974.

## OPINIONS BELOW

The Judgment of the Trial Court for the Northern District of Texas, Dallas Division, entered on the 5th day July, 1972 is unreported and is set forth as Item 24 of the Record, Vol. I. filed with the United States Court of Appeals for the Fifth Circuit, which Record has been transmitted by the Clerk of that Court to the Clerk of this Court. The Opinion of the United States Court of Appeals for the Fifth Circuit and the Order Denying a Petition for Rehearing by such Court appear in Appendix "A" hereto. The Opinion is reported at ....F. 2d 1468 (5th Cir. 1974).

## JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1974. The denial of a timely Petition for Rehearing was entered on April 3, 1974. This Petition for Certiorari is filed within ninety (90) days of that date. The Jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

## QUESTIONS PRESENTED

(1) Were the Petitioners deprived of due process of law by the action of the Court of Appeals in refusing to review proceedings before the Trial Court because of an alleged failure to preserve certain points of error under the Federal Rules of Civil Procedure when such failure arose directly from instructions given Petitioners by the trial judge during the pendency of the case?

(2) When parties have entered into a valid compromise and settlement agreement, upon a clear repudiation by one party of his obligations under that agreement, may the non-repudiating party elect to accept that repudiation for purposes of avoiding his own obligations thereunder, and at the same time insist that the repudiating party be strictly bound by the agreement's terms?

(3) After parties have entered into a valid compromise and settlement agreement, when one of such parties expressly conditions his performance upon an additional undertaking by the other party not contained in that original compromise and settlement agreement, is such other party thereafter bound by such agreement?

(4) Upon allegations of fraud arising under the Securities Act of 1933 and the Securities Exchange Act of 1934, may the defrauded parties be held to have released all claims and causes of action against the fraudulent party without an express finding of fact upon the disputed issue of whether such defrauded parties had intentionally and knowingly waived their rights under such laws?

## STATUTES INVOLVED

The pertinent portions of the Securities Act of 1933 (§14 and §17(a)), Securities Exchange Act of 1934 (§10(b) and §29(a)), and the Federal Rules of Civil Procedure, (Rules 49 and 51), are set forth in Appendix "B" hereto.

## STATEMENT OF THE CASE

This is a suit for damages brought by Petitioners ("Murtagh and Powell") alleging certain causes of action against the Respondent ("U.C.C.") arising from breaches of contract, conversion of shares of common stock, and violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. The transactions between these parties and ultimately this suit arose from a contract of sale whereby Murtagh and Powell sold to U.C.C. two computing companies wholly owned by Murtagh and Powell and located within Great Britain for a consideration comprised of certain sums of cash and shares of U.C.C. common stock.

The case was tried before a jury, and after the conclusion of the evidence the Trial Court, pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, submitted the case to the jury upon special interrogatories. By its answers the jury found all the elements necessary for Petitioners to recover on their claims that U.C.C. had made actionable misrepresentations and omissions and had wrongfully converted the stock owned by them. In response to additional interrogatories, however, the jury returned a verdict which

the Trial Court ruled established a settlement agreement between the parties. Based upon such verdict, the Trial Court entered judgment that Plaintiffs take nothing against the Defendant. The United States Court of Appeals for the Fifth Circuit upheld such judgment.

A complete statement of the facts can be found in the record on file herein, Volumes I through III. However, the material facts, as they relate to the questions presented to this Court, may be summarized briefly as follows:

In April, 1967, Petitioners Murtagh and Powell owned beneficially all of the outstanding shares in two computer companies operating and doing business in Great Britain. They were contacted in England by agents of U.C.C. soliciting an offer of sale of these companies. As a result of this contact, Murtagh and Powell traveled to the U.C.C. offices in Texas for purposes of investigating such a sale.

Thereafter, there were various representations and presentations made on behalf of U.C.C. to Murtagh and Powell in connection with such proposed purchase and sale, and Murtagh and Powell have alleged and the jury has found that such representations and certain omissions were fraudulent and in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934.

Thereafter, Murtagh and Powell did agree to sell their existing companies to U.C.C. for certain sums of cash and shares of the common stock of U.C.C., all under the terms of a written Stock Purchase Agreement. Under such Agree-

ment Murtagh and Powell were to receive and did receive at various times a substantial number of shares of U.C.C. common stock. However, U.C.C., after the initial issuance of a portion of such stock, placed restrictive legends upon that stock, and communicated with various banks at which the Petitioners had pledged their stock, indicating that the stock was restricted as to sale, and that such shares were not freely marketable. As a result of these actions, which the jury found in its verdict to constitute a conversion of those shares of stock, Murtagh and Powell were unable to sell such shares of common stock for an extended period of time, and were thus damaged by U.C.C.'s action in a substantial amount, again found by the jury in their verdict.

The jury further found that in March, 1970, it was agreed in substance between Eldon Vaughn, acting for U.C.C., and Powell that in full and complete satisfaction of all claims and controversies between the parties U.C.C. would register the Plaintiff's U.C.C. stock with the Securities Exchange Commission and accelerate the remaining payments of U.C.C. shares and cash to become due under the amended Stock Purchase Agreement. After such Agreement, U.C.C. communicated with Powell, transmitting a form for general release, and indicating that such general release must be executed by Petitioners before U.C.C. could perform as earlier agreed under the compromise and settlement agreement. Powell indicated that this general release would not be signed and telegramed U.C.C. that the terms for settlement were not acceptable. Thereafter, U.C.C. failed to accelerate the remaining shares of stock

and cash, but insisted that Murtagh and Powell were in fact bound by the restrictions of the compromise and settlement agreement.

The Court of Appeals in its Opinion, held that U.C.C.'s insistence upon the performance of an additional term not part of the original agreement did not justify Petitioner's rejection of the compromise and settlement agreement, because the jury was not asked whether the imposition of such additional condition would justify such actions on the part of the Petitioners and, as a result, Petitioners waived their right to complain of such under Rule 49(a) of the Federal Rules of Civil Procedure. The Court further ruled that U.C.C. was not required to make an election upon receipt of Powell's telegram rejecting the compromise agreement, to either stand upon such agreement or accept the repudiation and refuse to perform, once more for the reason that Petitioners failed to object pursuant to Rule 49(a) of the Federal Rules of Civil Procedure to the Court's instruction in regard thereto. Finally, the Court ruled that it was unnecessary for Respondents to secure a finding that Petitioners were aware of their rights under the Securities Laws prior to compromising and settling their claims arising thereunder for the reason that such a finding was not requested by Petitioners pursuant to Rule 49(a) of the Federal Rules of Civil Procedure.

## REASONS FOR GRANTING WRIT

1. *The Trial Court has so far departed from the accepted and usual course of judicial proceedings and the Court of Appeals has so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.*

Following the close of the testimony in this suit the attorneys and the Court worked for approximately two full days in the preparation of the Court's Charge. During this period many objections were made by both parties to the form and substance of the proposed special issues and after hearing and listening to all of the objections of both parties, the Court's Charge was finally reduced to writing and the Court advised the attorneys to make such exceptions or objections as they might desire by dictating them to the court reporter and the Court further advised the attorneys that he was satisfied with the Charge and that he would not be present during the dictation of the respective objections and exceptions and actually was not present during such dictation, and no changes were made in the Court's Charge thereafter. (Findings In Regard To Objections To The Charge, Supplementary Record filed September 6, 1972.)

Following the preparation of the Court's Charge and after the discussions referred to, the Court instructed counsel to make whatever objections they chose and they would all be considered timely. He stated that these objec-

tions and exceptions should be made without his being present, that he had heard every possible objection and exception during the two-day preparation of the charge, and that any objections and exceptions made in this informal manner would be overruled by him. Thereafter, a court reporter was made available to the attorneys for both parties and each dictated to that reporter a shorthand or summary version of those objections and exceptions to the Court's Charge which had been discussed during the prior two days. In fact, the trial judge stated, *prior* to such dictation, "The objections are timely made *as are all requests for special instructions as well as special issues were timely made and considered by the Court.*" (emphasis added) (R. Vol. 1, Item 22).

Subsequently, the Petitioners filed a document styled "Plaintiffs' Objections and Exceptions to the Charge of the Court" (R. Vol. I, Item 17) wherein they made a more formal declaration of all those objections and exceptions previously made to the Charge and overruled by the Court. In response to this, the Respondent filed with the Court a Motion to Strike such instrument (R. Vol. I, Item 21) contending that only the shorter, condensed version of such exceptions and objections could be considered, despite the Court's earlier statements concerning the numerous and all-inclusive objections previously made. Thereafter, the Court granted the Defendant's Motion to Strike and made those findings of fact recited above. (R. Vol. I, Item 23).

In its Opinion, the Court of Appeals ruled that the Petitioners were precluded from raising various issues and

points of error in regard to the actions of the trial court in that the applicable rules of Federal Civil Procedure were not strictly adhered to, in spite of the trial court's instructions to the parties indicating that the precise formal requirements of the rules requiring exceptions and objections need not be complied with since he was "satisfied with the Charge and would not be present during the dictation of the respective objections and exceptions".

The Federal Rules of Civil Procedure dealing with exceptions and objections to special issues and to instructions to the jury provide that a party may except or object to those special issues or instructions prepared by the Court before such are submitted to the jury and that the Court is thereby required to rule on such either modifying its Charge or refusing to include them as it sees fit. Rules 49 and 51, *Federal Rules of Civil Procedure.* There is no requirement in either rule that this be done in writing by the parties, but rather it is only required that the objecting party state distinctly the matter to which he objects and the grounds for his objection. In fact, the courts dealing with this problem have held that written objections, while preferred, are not necessary so long as the record on appeal demonstrates that they were, in fact, made. (as demonstrated here by the Court's Finding.) *Hull v. U.S.*, 324 F.2d 817 (CA 5th, 1963); *Dunn v. U.S.*, 318 F.2d 89 (CA 5th, 1963); *Winstead V. Hildenbrand*, 159 F.2d 25 (CA Dist. Col., 1946); *Hower v. Roberts*, 153 F.2d 726 (CA 8th, 1946); *Swiderski v. Moodenbaugh*, 143 F. 2d 212 (CA 9th, 1944).

The Court of Appeals by its ruling has refused to give the Petitioners opportunity to complain of error on the part

of the Trial Court by holding them to the strict requirements of the applicable procedural rules, and has yet disregarded the Trial Court's actions in indicating to the parties that such strict adherence was unnecessary. To deprive these parties of a full and proper review of the Trial Court's actions in such circumstances, and especially in light of the handling by the lower court of the exceptions and objections to the Charge, constitutes a denial of due process and such a departure from accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision over those courts. The Petitioners assert that the requirements of the procedural rules were essentially and sufficiently complied with and that the action of the Trial Court in refusing to allow a formal documentation of those exceptions and objections previously made and ruled on by him as well as the action of the Court of Appeals in refusing to consider such exceptions and objections was error.

2. *The Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeal on the same matter and in conflict with applicable state law.*

(a) The jury having found in response to a special interrogatory that a compromise and settlement agreement was entered into between the parties in March of 1970, it is undisputed that thereafter Powell forwarded a telegram to U.C.C. on or about April 18, 1970, indicating that the proposed terms of the agreement were not acceptable. U.C.C. has contended in this suit that as a result of such telegram it considered this compromise and settlement

agreement to have been repudiated by the Petitioners and that it thereafter did not consider itself obligated to perform under the terms of the oral agreement and in fact, did not so perform. (R. 747, 1138-1139). If U.C.C. is correct in this assertion that the telegram of Powell acted as a repudiation or anticipatory breach of the compromise and settlement agreement, the law is well settled that U.C.C. had an option at that time to either accept the repudiation and rescind the contract, in which circumstance U.C.C. would have a cause of action against the Petitioners for damages occurring as a result of such breach, or it could elect to stand upon the terms of such agreement and require the Petitioners to abide by them. *Continental Casualty Co. v. Boerger,* 389 S.W.2d 566 (CCA 1965, writ dismissed); *Kingsbery v. Phillips Petroleum Company,* 315 S.W. 2d 561 (CCA 1958, writ ref., n.r.e.); *Humphrey v. Showalter,* 283 S.W.2d 91 (CCA 1955, writ ref., n.r.e.); *Engelbrecht v. Pitzer,* 279 S.W.2d 608 (CCA, 1955, writ ref., n.r.e.); *Vise v. Foster,* 247 S.W.2d 274 (CCA 1952, writ ref., n.r.e.); *Main v. Hopkins,* 229 S.W.2d 820 (CCA 1950, n.w.h.); *Hooper v. Bell,* 210 S.W.2d 870 (CCA 1948, writ ref., n.r.e.); *Green v. Franklin Dress Co.,* 137 S.W.2d 131 (CCA 1940, n.w.h.); *Texas Seed and Floral Co. v. Chicago Set and Seed Co.,* 187 S.W. 747 (CCA 1916, writ ref'd); *Humphrey v. Placid,* 142 F. Supp. 246 (E.D. Tex., 1956). Under the undisputed facts in our case, U.C.C. elected to rescind the agreement and cease performance under it (which gave it the right to sue for damages as a result of such anticipatory breach, although such has not been asserted by it in this suit) and having made such a binding election to rescind, the agreement can stand as absolutely no defense to the Petitioners' causes of action asserted in this suit.

The Court of Appeals, as pointed out above, has ruled in its Opinion that the Petitioners are precluded by the record in this case from making such complaint, and that further, since the Trial Court instructed without objection that there was no further obligation on U.C.C. to perform after the receipt of the April 18 telegram, that Petitioners are now bound by this declaration of the law on the case. Petitioners' complaint of this restrictive ruling of the Court of Appeals as such applies to this alleged point of error has been set forth above. However, Petitioners assert that the Federal Rules of Civil Procedure and the authorities thereunder, allow a recovery as sought by the Petitioners in this case, within the boundaries of the record before the Court of Appeals.

At the conclusion of all evidence, the Trial Court submitted its charge to the jury upon special interrogatories pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, thereby attempting to obtain specific factual findings in regard to those disputed matters of fact raised by the evidence. During the course of submitting the special interrogatories and in connection with Special Issue Number 22, that court stated:

> "You are instructed in this connection that UCC was not required to continue performance of its agreement, if any you have found in answer to Special Issue No. 22 above, after receiving the telegram from Powell on or about April 18, 1970".

When a case is submitted to a jury upon special interrogatories, the jury is required to ascertain answers only to

issues of fact, and instructions of law are neither appropriate nor required. *Cate v. Good Brothers, Inc.*, 181 F.2d 146 (CA 3rd, 1950); *Great American Insurance Co. v. Horab*, 309 F.2d 262 (CA 8th, 1962); *Walther v. Omaha Public Power District*, 412 F.2d 1164 (CA 8th, 1969).* In such a case the Court is not required to instruct the jury as to applicable law because the application of the pertinent and correct legal principles are for the court, not the fact finder. *Millard v. Municipal Sewer Authority of Lower Makefield*, 442 F.2d 539 (CA 3rd, 1971).

It is true, as pointed out by the Court Appeals in its opinion, that Rule 51 provides for instructions of law to the jury, but such instructions would apply, by definition, only to a general charge by the court, where it is encumbent upon the jury to make a general finding in favor of a party, based upon the facts as found by them and upon the law as given by the court. As to Rule 49(a), which the Court of Appeals has concluded precludes the Petitioners from complaining of the Trial Court's judgment in this regard, such procedural rule merely disallows a complaint as to "any issue of fact" which is omitted by the court and unobjected to by the parties. The Trial Court's action in our case in instructing the jury as to what he felt to be the applicable law arising as a result of Powell's telegram, was unnecessary, has not been and needs not be complained of by

*The one exception to this rule is that should the court submit to the jury a question of mixed fact and law, he must accompany such question with appropriate instructions of law explaining the legal standards which they are to apply. *McDonald v. Timmerman*, 269 F.2d 54 (CA 8th, 1959); *Jackson v. King*, 223 F.2d 714 (CA 5th, 1955). In the case at bar, Special Issue No. 22 is an issue entirely of fact with no legal conclusions sought of the fact finder, and no instructions of law required. Therefore, this exception is not applicable.

either party, and is uncontrolling upon the decision of this court as to the true legal principle to be applied to the jury's special verdict. *Clayton v. Burston*, ....F.2d.... (5th Cir. May 3, 1974). No authority was cited by the Court of Appeals in its decision nor does any exist that the Trial Court, by his erroneous and unnecessary instruction of law, given in connection with a charge on special interrogatories, may alter established law or impose upon the parties a theory of law inconsistent and in direct conflict with the established legal principles applicable to the jury's finding.

Therefore, although the Court of Appeals rather summarily stated that Petitioners are precluded by Rule 49(a) from complaining of the Trial Court's erroneous instruction of law, and by implication that they are bound by such erroneous instruction that Court has misconstrued the applicable procedural rule. If, in fact, the instruction cited above and given by the Trial Court is erroneous, and if, in addition, the correct legal proposition, when considered in conjunction with the jury's factual findings, affords the Petitioners a basis for relief, such relief should be forthcoming under the record before this court. *Clayton v. Burston, supra.*

Despite the Trial Court's erroneous instruction of law cited above, the legal duty or election of U.C.C. is not as construed by the Trial Court, but rather U.C.C. had mutually exclusive options available to it, as a result of Powell's telegram, and the jury's verdict, as well as the undisputed evidence in the case, demonstrates that the course of action taken by U.C.C. will allow a recovery by Petitioners under the causes of action as found by the jury.

The laws of this state are unquestioned that a party may anticipatorily breach or repudiate a contract prior to the date set for its performance. *Pollack v. Pollack,* 39 S.W. 2d 853 (Comm. App., 1931). It is undisputed before this court that U.C.C. considered Powell's telegram as such a repudiation. However, a threat to repudiate a contract may be withdrawn, leaving no cause of action even for nominal damages, unless the party entitled to performance has manifested an election to accept the repudiation and rescind the contract. *Kingsbery v. Phillips Petroleum Co., supra.*

The general rule is that when one party to a contract has repudiated, the other party may (1) rescind and consider the contract at an end, or (2) may treat such conduct as a breach of contract and bring action for damages arising from such breach, or (3) he may treat the repudiation as inoperative and await the time when the contract is to be performed, then hold the other party responsible for all consequences of non-performance. *Humphrey v. Showalter, supra.* If the party not in default elects to keep the contract open, he keeps it open for the benefit of the opposite party as well as for his own, *and remains subject to all his own obligations and liabilities under it. Pollack v. Pollack, supra; Wellington R.R. Committee v. Crawford,* 216 S.W. 151 (Comm. App., 1919); *Vise v. Foster, supra;* 17 *C.J.S. Contracts,* Sec. 472; 10 *Tex. Jur.* 455.

In the case at bar, had U.C.C. elected and chosen to stand upon the settlement agreement and to obtain the benefit of Petitioners' agreement for "satisfaction of all

claims and controversies", they should have performed their obligations, which, under the terms of the contract of settlement itself, would have affected the settlement of "all claims and controversies" without further action or defense on behalf of Petitioners. On the other hand, had U.C.C. chosen to accept the repudiation, they were entitled to cease performance of their obligations under the settlement agreement and sue Petitioners for any damages arising from the breach, which in this case would amount to the costs and expenses of registering Petitioners' shares of stock in partial satisfaction of the settlement agreement itself. Here, U.C.C. has attempted to retain the benefits of the contract and of the repudiation as well, by insisting that all claims have been released while at the same time refusing to pay the agreed consideration for such release. Where a contract has been repudiated, the party not in default has alternative remedies open to him but he may not pursue all of them and specifically may not claim damages for an anticipatory breach and at the same time keep the contract in force. *Lumberman's Mutual Casualty Company v. Klotz*, 251 F.2d 499 (CA 5th, 1958).

It is of no comfort to the Defendant-Respondent to claim that as a result of Powell's telegram, they were no longer required to tender performance or "do a useless act". By the terms of the settlement agreement, all actions and duties under such agreement were imposed upon University Computing Company, after the accomplishment of which, claims and controversies were compromised by operation of the document itself. U.C.C. had only to complete its undertakings by the compromise agreement, and Peti-

tioners would have been forever barred from asserting any claim as made here. However, U.C.C. chose instead to refuse to pay the bargained for consideration, and whether such was their intended result or not, as a matter of law they are not entitled to rely upon the compromise recited in the agreement.

The Court of Appeals in its opinion has treated lightly the Petitioners' complaint as to the failure to *accelerate* cash and shares of stock under the settlement agreement and has concluded that ". . . U.C.C. performed a substantial part of what it had undertaken by the settlement agreement to do . . ." It is submitted that a partial or "substantial" compliance is no just basis for foreclosing the rights of the Petitioners.

The jury in response to the special interrogatories submitted to it found all elements of Securities Act fraud, and conversion by the Defendant UCC and in addition found quite substantial damages resulting to Petitioners from U.C.C.'s actions. It could hardly be disputed that the consideration agreed upon in the compromise agreement, i.e. the registration and acceleration of shares of stock and the acceleration of sums of cash, was indeed meager when compared with the actual damages sustained by Petitioners as a result of U.C.C.'s acts. In light of this, Murtagh and Powell certainly had a right to insist upon full and complete performance by U.C.C. of its obligations before extinguishing their claims against it, and should not be foreclosed by a showing of a token or "substantial" effort toward compliance.

(b) The jury has found that U.C.C. and Powell entered into an oral settlement agreement in March of 1970. However, the evidence before the Trial Court, when considered in light of the existing applicable law, shows that as a matter of law, U.C.C. through its subsequent acts repudiated and abandoned such settlement by attempting to impose additional and more burdensome conditions to that intital agreement and that as a result of this repudiation, Petitioners elected to rescind the oral settlement by Powell's telegram of April 18, 1970.

The law is well settled that an anticipatory breach will be recognized as actionable by the courts of this state; and, where such a breach is shown to exist, the courts will give immediate relief thereon. *Humphrey v. Placid, supra; Pollack v. Pollack, supra; Wukosh v. Hoover,* 247 S.W.2d 593 (CCA 1952, aff. 254 S.W. 2d 507). In addition, after such repudiation the party complying with the terms of the contract can either accept the repudiation and rescind the contract or, he may elect to stand on the terms of such agreement and sue for damages upon the performance date. *Green v. Franklin Dress Company, supra; Hooper v. Bell, supra; Texas Seed and Floral Co. v. Chicago Set and Seed Co., supra; Engelbrecht v. Pitzer, supra.*

Furthermore, it has been held in a number of Texas cases that where one party attempts to impose on the other contracting party additional conditions to an existing contract, such that, unless such conditions are met, the contract will not be honored, this will be considered as a repudiation of the existing contract and the other party

may regard such repudiation as an anticipatory breach of the contract. *Humphrey v. Placid, supra; Balfour v. Brown,* 110 S.W. 2d 104 (CCA 1937, n.w.h.); *Swift v. Continental,* 170 S.W. 114 (CCA 1914, writ ref'd); *Weiss v. DuroChrome,* 207 F.2d 298 (CA 8th, 1953); *Kromer v. Photo-Scan,* 305 F. Supp. 461 (N.D.Tex., 1969); *American Fidelity v. Williams,* 34 S.W. 2d 396 (CCA 1930, writ ref'd.); *Great American Indemnity Company v. City of Corpus Christi,* 192 S.W. 2d 917 (CCA 1945, writ ref., n.r.e.); *National Life Company v. Harvey,* 159 S.W.2d 920 (CCA 1942, n.w.h.).

The Respondents have heretofore taken the position that the requirement of the general release by U.C.C. was no more burdensome than the oral agreement already reached by the parties. However, an examination of that agreement as found by the jury will demonstrate that there was not one single obligation on the part of Petitioners in this oral settlement in that the actions thereunder were completely unilateral on the part of U.C.C. and once it had performed and completed those acts required of it, all claims and controversies between the parties were satisfied by the operation of the agreement itself. There was no obligation, duty, or required performance on the part of either of the Petitioners necessary to satisfy the oral agreement and this included the execution of any general release form.

The Court of Appeals in its Opinion has again ruled that Petitioners may not be allowed to raise this point on appeal because it "was not the subject of an interrogatory, nor did Appellants request that it be". The Petitioners assert in this regard that the *factual* basis for their position exists

within the record before the Trial Court and is undisputed and was therefore improper for submission to the jury. There remains only the application of the appropriate law to these undisputed facts which Petitioners assert was for the court and not the jury.

(c) It is the settled law in regard to Securities Act fraud actions that any attempt to settle a dispute or waive violations of the applicable statutes is void as against public policy. Section 14 of the Securities Act of 1933 states:

> "Section 14. Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."

Section 29(a) of the Securities Exchange Act of 1934 provides, in part:

> "Section 29(a). Any condition, stipulation or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder or of any rule of an exchange required thereby shall be void."

In *Pearlstein v. Scudder & German,* 429 F.2d 1136 (CA 2nd, 1970), the Court held that a stipulation entered into during a trial in a state court, which waived the Plaintiffs' rights under the Securities Exchange Act of 1934, was void in light of Section 29(a) of that Act.

Thereafter, in *Cohen v. Tenney Corp.*, 318 F. Supp. 280 (D.C., N.Y., 1970), a general partnership had gone under and the limited partners were claiming fraud in the sale of the limited partnership interest. The general partner sent a check to the limited partners as a settlement of their claims. On the back of the check was contained a general release and such was signed when the limited partners endorsed the checks. These limited partners then brought suit under Section 17(a) of the Securities Act of 1933 and these releases were pled as an affirmative defense. In its decision, the Court held the release void and stated:

> "In light of the public policy controlling the enforcement of the 1933 Securities Act and the 1934 Securities Exchange Act as expressed in *Pearlstein,* I hold that general releases here offered as an affirmative defense to violation of those acts must be dismissed as void."

Upon a rehearing of this case, the Court changed its position to some extent and stated:

> "The Court of Appeals for this circuit has recently treated the question of the validity of postcontroversy settlements of Securities Act claims in *Pearlstein v. Scudder & German* . . . I do not find that decision controlling here . . . .
>
> "The importance of *Pearlstein,* in my view, is not that all settlements of mature claims short of litigation are void; but rather that they are not necessarily above judicial scrutiny as the District Court in that case had erroneously ruled. Since the 1933 Securities Act does not require persons aggrieved by violations of

its provisions to sue, this general release purporting to settle an already ripened controversy, is not by its terms void as a matter of law.

"This inquiry however does not end here. Judicial hostility toward waivers generally requires that the right to private suit for alleged violation be scrupulously preserved against unintentional or involuntary relinquishment. Otherwise, renegotiation of settlements would indeed undermine, rather than abet, the cause of effective enforcement of the interest which the community as a whole, as well as the aggrieved individual, has in regulation of the securities markets. This court, therefore, must afford the parties opportunity to produce evidence of the circumstances surrounding the obtaining of the release . . ."

In light of the clear wording of the statutes cited and of their interpretation by the court of Appeals in the *Pearlstein* case, it is apparent that an attempted compromise and settlement, in a case such as ours, is not effective and will be considered void as against public policy. Even assuming that the District Court in the *Cohen v. Tenney* case was correct in its restrictive application of the statute, the evidence in the case at bar clearly establishes that any settlement or attempted settlement by the Petitioners represented an "unintentional or involuntary relinquishment" of their rights and protections under the federal securities laws, and that the Trial Court should have found the attempted settlement wholly insufficient in regard to U.C.C.'s violations.

In the case of *Childs, et al v. RIC Group, Inc.*, CCH Fed. Sec. Law Rep., Section 93,333 (D.C., Georgia, 1970), the

Court, in discussing the defendant's contention that the plaintiffs had waived any rights they may have had under the Securities Exchange Act of 1934 to complain of the defendant's wrongful acts, stated,

> "Waiver of rights under the Securities Exchange Act of 1934 should be limited to cases where it is intentional. Therefore, to support a finding of waiver, *it must be found that the particular statutory right was actually known.* A party does not waive these rights without acting in full knowledge thereof." (Emphasis added.)

In the first place, it should be pointed out that there is no evidence whatsoever in the record of this case to demonstrate that Murtagh and Powell were informed of the "particular statutory rights" afforded them by the Securities Acts. However, even had such evidence existed in the record of the case, as pointed out by the Court in *Childs,* U.C.C. must have a finding of fact that the particular statutory right was actually known, and obviously no such finding exists.

In the case of *Royal Air Properties, Inc. v. Smith,* 333 F.2d 568 (CA 9th, 1964), the Court, in discussing the defendant's defense of a waiver of the plaintiff's rights under the applicable Securities Act, stated the following,

> "It has been held by this Court that waiver is 'the voluntary or intentional relinquishment of a known right. It emphasizes the mental attitude of the actor.' Since waiver is a voluntary act, there must be knowledge of the right in question before the act of relinquishment can occur.

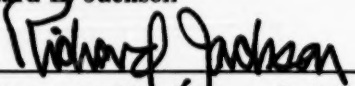
"Although the formulation of the doctrine is simple, the Courts have not been uniform in deciding what facts will support a waiver. In particular they have differed as to what constitutes knowledge of a right claimed to be waived. Some Courts have held that there is a duty to make inquiry if one learns facts sufficient to put him upon notice and that knowledge of all the facts that a reasonably diligent inquiry would disclose would be imputed. Others have stated that full knowledge of a right is a prerequisite to its waiver; one stated 'the doctrine of waiver and ratification is founded upon the fact of knowledge of all the facts, and not upon negligence.'

"When waiver is predicated upon facts of which one has inquiry but not actual notice, it is no longer intentional. We feel that waiver of rights under the Securities Exchange Act of 1934 should be limited to those cases where it is intended and therefore the right in question must be found to be actually known before waiver becomes effective. This is as it should be because there is a period of limitations applicable to cases brought under Section 10(b); the statutory period should not be cut short by a waiver with the mental element disregarded. To hold one to diligence in discovering his rights is reasonable in the case of laches or estoppel, where another has acted in the interim to his detriment. The defenses of laches or estoppel do not spring principally from intent, as does waiver, but from injury to the deceived party caused by the neglect or misleading action to the delaying party. But no detriment to a third party is required for waiver, it is unilaterally accomplished. We therefore see no reason to find a waiver if one has not acted with full knowledge of his rights." (p. 571).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,
JOHNSON, BROMBERG, LEEDS & RIGGS
Louis P. Bickel
Richard D. Jackson

By 

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**Appendix "A"**
**Opinions In The Lower Courts**
**In The**

# United States Court of Appeals

**FOR THE FIFTH CIRCUIT**

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**No. 72-2893**

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In The Matter Of: MARION MURTAGH and
WILLIAM JOSEPH POWELL
*Appellants*

*versus*

UNIVERSITY COMPUTING COMPANY
*Appellees*

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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS*

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March 6, 1974

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Before AINSWORTH, GODBOLD and INGRAHAM,
Circuit Judges

INDEXED

**Marion MURTAGH and William Joseph Powell, Plaintiffs-Appellants,**

**v.**

**UNIVERSITY COMPUTING COMPANY, a Texas corporation, et al., Defendants-Appellees.**

No. 72-2893.

**United States Court of Appeals, Fifth Circuit.**

March 6, 1974.

Sellers brought action against corporation for damages arising from sale to corporation of two companies in exchange for corporation's common stock and cash and alleged violations of antifraud provisions of federal securities laws and Texas Business and Commerce Code, breach of contract and conversion of property. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., Chief Judge, rendered judgment for the corporation and the sellers appealed. The Court of Appeals, Godbold, Circuit Judge, held that evidence sustained determination that parties had orally agreed to settle dispute; that even if jury's finding omitted necessary factual findings, it would be deemed that district court, in accord with its entry of judgment for corporation, made findings that antecedent bona fide disputes existed between parties as to whether corporation committed fraud and conversion and, therefore, settlement agreement was adequate to bar recovery under fraud and conversion claims as well as under claim for breach of contract.

Affirmed.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

**1. Compromise and Settlement 2**

Creation of a settlement agreement requires meeting of the minds of contracting parties on subject matter of the agreement.

**2. Compromise and Settlement 23(3)**

Testimony of corporation's general counsel that he and one seller of companies to corporation had orally agreed that, if corporation would register stock given to sellers in payment for companies and accelerate remaining payments of stock and cash due them, sellers would release corporation from any liability under stock purchase agreement and not initiate litigation against corporation sustained determination that parties had orally agreed to settle sellers' claims against corporation arising from the sale.

**3. Compromise and Settlement 6(2)**

Existence of an antecedent bona fide dispute between parties concerning subject matter of a subsequent settlement agreement is sufficient legal consideration for creation of an enforceable settlement agreement.

**4. Compromise and Settlement 23(1)**

Party claiming that settlement agreement has been created has burden of exhibiting that bona fide dispute existed as to subject matter.

**5. Compromise and Settlement 16(1)**

In action arising from sale of companies to corporation in exchange for stock and cash, even if jury omitted factual findings necessary to establish that agreement of parties to settle dispute was applicable to sellers' claims against corporation for violation of antifraud provisions and for conversion as well as to claim for breach of contract, where neither party raised objection to adequacy of special issue submitted to jury, it would be deemed that district court, in accord with its entry of judgment for corporation, made findings that antecedent bona fide dispute existed between parties as to whether defendant had committed fraud and conversion; thus, settlement agreement barred claims for violations of antifraud provisions and for conversion as well as claim for breach of contract. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j; V.T.C.A., Bus. & C. § 27.01; Fed.Rules Civ.Proc. rules 49(a), 52(a), 28 U.S.C.A.

**6. Compromise and Settlement 3**

Agreement to settle claim against corporation for alleged violation of antifraud provisions of federal securities laws was not void as against public policy. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j.

**7. Securities Regulation 131**

Federal securities laws do not compel persons harmed by acts violating provisions of the laws to seek their remedies only through litigation. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j.

**8. Compromise and Settlement 3**

Settlements of claims arising from acts which are violations of the securities laws are not void as a matter of law, at least, where such settlement agreements do not themselves continue the precise conduct which violates the laws. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j.

**9. Securities Regulation 101**

Judicial hostility toward waivers of statutory rights requires that the rights to private suit extended by the securities laws for alleged violations be scrupulously preserved against unintentional or involuntary relinquishment. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j.

GODBOLD, Circuit Judge:

Appellants Murtagh and Powell, subjects of the United Kingdom, sued University Computing Co. (UCC), a Texas corporation, for damages arising from their sale to UCC of two computer companies[1] for UCC common stock and cash. Appellants charged they suffered these damages because of the following alleged acts or omissions by UCC. (1) UCC in violation of antifraud provisions of federal securities laws[2] and the Texas Business and Commerce Code[3] made material misrepresentations that the UCC stock to be paid appellants could be freely sold in the over-the-counter market or through a stock exchange at any time after such shares were delivered, and failed to disclose the consequences which could result from UCC's failure to register the stock in accordance with federal securities laws. (2) UCC breached a written contract (the Stock Purchase Agreement dated June 30, 1967), wherein UCC agreed to exchange UCC common stock and cash for all the stock in appellants' two computer companies by delivering stock to appellants which could not be freely sold immediately after delivery in the over-the-counter market or through a stock exchange. (3) UCC wrongfully converted appellants' property by placing restrictive legends upon the UCC stock

[1] Computer Services (Birmingham, England) Ltd. and Computer Bureau (Shannon, Ireland) Ltd.

[2] Appellants pleaded violations of § 17(a) of the Securities Act of 1933 [15 U.S.C.A. § 77q(a) (1971)], § 10(b) of the Securities Exchange Act of 1934 [15 U.S.C.A. § 78j(b) (1971)] and of SEC Rule 10b-5 [17 C.F.R. § 240, 10b-5 (1972)].

[3] Section 27.01, Vernon's Tex. Bus. and Comm. Code Ann. (1968).

delivered to them[4] and by advising third parties[5] that the UCC stock owned by appellants could be sold only subject to restrictions imposed by the federal securities laws.

At trial the court, pursuant to Fed.R.Civ.P. 49(a), submitted to the jury a series of written questions, which we set out in the margin together with the jury's answers, with the exception of questions not essentially related to the points we discuss below.[6] By its answers the jury found all

[4] It is not disputed that the stock UCC issued appellants as partial consideration for selling their companies was unregistered. *See* 15 U.S.C.A. § 77e (1971). UCC contends, however, that the stock was issued in a "private placement" transaction which was exempted from the registration provisions of the securities laws, *see* 15 U.S.C.A. § 77d (1971), and that the legends were necessary and proper to establish and preserve this exemption. Our disposition of the appeal makes it unnecessary for us to rule on UCC's contentions and to decide whether such legends could, as a matter of law, constitute acts of conversion.

[5] UCC contends that letters to such third parties as a matter of law, could not constitute conversion. Again, our disposition of the case allows us to pretermit adjudication of this contention.

[6] "SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that, in connection with the negotiations leading up to the execution of the Stock Purchase Agreement dated June 30, 1967, the officers or agents of University Computing Company acting as such represented to Marion Murtagh and William Joseph Powell that the shares of the common stock of University Computing Company which were to be delivered to them pursuant to such Agreement could be freely sold in the over-the-counter market or through a stock exchange at any time after such shares were delivered?

Answer 'They did' or 'They did not.'

ANSWER: *They did*

If you have answered Special Issue No. 1 'They did,' answer Special Issue No. 2; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the representation mentioned in Special Issue No. 1 was false?

Answer 'it was false' or 'It was not false.'

ANSWER: *It was false*

If you have answered Special Issue No. 2 'it was false', answer Special Issue No. 3; otherwise, you need not answer same.

the elements necessary for appellants to recover on their claims that UCC had made actionable misrepresentations and omissions and had wrongfully converted stock owned

"SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the officers and agents of University Computing Company making the representation mentioned in Special Issue No. 1 either knew that such representation was false or did not know whether it was true or false?

Answer 'Yes' or 'No'

ANSWER: *Yes*

If you have answered Special Issue No. 3 'Yes', answer Special Issue No. 4; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such representation was of a material fact?

Answer 'Yes' or 'No'

ANSWER: *Yes*

If you have answered Special Issue No. 4 'Yes', answer Special Issue No. 5; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that Marion Murtagh and William Joseph Powell relied upon such representation in connection with the purchase of the common stock of University Computing Company?

Answer 'They did' or 'They did not'

ANSWER: *They did*

If you have answered Special Issue No. 5 'They did,' answer Special Issue No. 6; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that, as a result of the securities not being freely saleable in the over-the-counter market or on a stock exchange, Marion Murtagh and William Joseph Powell sustained monetary loss?

Answer 'They did' or 'They did not'

ANSWER: *They did*

"SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that officers and agents of University Computing Company acting as such failed to state to Marion Murtagh and William Joseph Powell the consequences which could result from the failure of University Computing Company to register under the Securities Act of 1933 the sale of the shares of common stock of University Computing Company to be delivered to them pursuant to the Stock Purchase Agreement dated June 30, 1967, as amended by Agreement dated July 18, 1968?

Answer 'They failed to do so' or 'They did not fail to do so'

by them. But by its answers to questions 20-22 the jury also made findings material to the creation and effect of a settlement agreement between the parties. The trial judge,

ANSWER: *They failed to do so*

If you have answered Special Issue No. 7 'They failed to do so', answer Special Issue No. 8; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that the omission to make the statement mentioned in Special Issue No. 7 was an omission to state a material fact necessary, in the light of the circumstances under which made, to make the facts stated not misleading?

Answer 'It was' or 'It was not'

ANSWER: *It was*

If you have answered Special Issue No. 8 'It was,' answer Special Issue No. 9; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that Marion Murtagh and William Joseph Powell would not have purchased shares of the common stock of University Computing Company but for the omission to state a material fact as heretofore found by you in reply to Special Issues Nos. 7 and 8?

Answer 'They would' or 'They would not'

ANSWER: *They would not*

If you have answered Special Issue No. 9 'They would not', answer Special Issue No. 10; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that, as a result of the omission to state a material fact as heretofore found by you in reply to Special Issues Nos. 7 and 8, Marion Murtagh and William Joseph Powell sustained monetary loss?

Answer 'They did' or 'They did not'

ANSWER: *They did*

"SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that the acts and conduct of University Computing Company in the following particulars under all the facts and circumstances before you amounted to a 'conversion' of any of the shares of Marion Murtagh and William J. Powell that they had received or had a right to receive:

A. The act and conduct of University Computing Company in the placing of a 'Legend' or language indicating some character of restriction upon any shares in fact delivered to them after December 31, 1968?

Answer 'It did' or 'It did not'

ANSWER: *It did*

relying upon the answers, entered judgment for UCC. Only Murtagh and Powell appeal. We affirm the judgment of the District Court.

B. The act and the conduct of University Computing Company in causing the letters in evidence before you to be directed to Barclays Bank DCO Nassau?

Answer 'It did' or 'It did not'

ANSWER: *It did*

C. The act and conduct of University Computing Company in causing the letters in evidence before you to be directed to First National City Bank (Channel Islands) Ltd.?

Answer 'It did' or 'It did not'

ANSWER: *It did*

If you have answered any of the above and foregoing Special Issues 11A, 11B, or 11C 'It did' then answer the following Special Issues:

"SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that such conduct was a conversion of:

A. The 21,000 shares Marion Murtagh received in late December 1967 and January 1968?

Answer 'It was' or 'It was not'

ANSWER: *It was*

B. The 5,379 shares received by Marion Murtagh that were due to her December 31, 1968!

Answer 'It was' or 'It was not'

ANSWER: *It was*

C. The 473 shares received by Marion Murtagh in late February 1970 as the result of an earlier stock dividend?

Answer 'It was' or 'It was not'

ANSWER: *It was*

D. The 6600 shares due to be received by Marion Murtagh December 31, 1969?

Answer 'It was' or 'It was not'

ANSWER: *It was*

"SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that such conduct was a conversion of

A. The 7,000 shares William J. Powell received in late December 1967?

Answer 'It was' or 'It was not'

ANSWER: *It was*

The parties present a multitude of points and counter-points for our disposition,[7] but once the dust settles it becomes clear that the dispositive points are the findings concerning the settlement agreement and its legal effect. As to these points appellants have raised essentially three different groups of contentions.

**[1, 2]** 1. They attack the sufficiency of the evidence and the adequacy of the jury's findings to establish a

B. The 6,100 shares William J. Powell purchased in the open market?

Answer 'It was' or 'It was not'

ANSWER: *It was*

C. The 5,379 shares received by William J. Powell that were due to him December 31, 1968?

Answer 'It was' or 'It was not'

ANSWER: *It was*

D. The 6,600 shares due to be received by William J. Powell on December 31, 1969?

Answer 'It was' or 'It was not'

ANSWER: *It was*

E. The 145 shares received by William J. Powell in late February 1970 as the result of an earlier stock dividend?

Answer 'It was' or 'It was not'

ANSWER: *It was*

* * * * * * * * * *

"SPECIAL ISSUE NO. 20

Do you find from a preponderance of the evidence that in March, 1970, there was a bona fide dispute between Plaintiffs and UCC as to the rights and obligations of the parties under the amended Stock Purchase Agreement of June 30, 1967, and with respect to the UCC stock delivered thereunder?

Answer 'Yes' or 'No.'

ANSWER: *Yes*

If you have answered the foregoing Special Issue 'Yes', then answer the following Special Issue. Otherwise you need not answer same.

"SPECIAL ISSUE NO. 21

[7] Many would be properly raised only if UCC had taken a cross-appeal from the jury findings adverse to it.

settlement agreement having the effect of barring recovery. Appellants correctly posit that the creation of a settlement agreement, as does the creation of any enforceable contract, requires a meeting of the minds of the contracting parties on the subject matter of the agreement. *See* Missouri, K. & T. Ry. Co. v. Texas, 275 S.W. 673 (Tex.Civ.App.1925, writ ref'd) and Mutual Fire & Auto. Ins. Co. v. Green, 235 S.W.2d 739 (Tex.Civ.App.1950, n. w. h.). Here appellants contend, the evidence does not show that the parties' minds ever met as to what their respective claims and controversies were and as to what each would do or give up in satisfaction of those claims and controversies. The court instructed the jury of question 21 that "agreed" meant a meeting of the minds. The appellants did not object to this instruction. UCC's General

Do you find from a preponderance of the evidence that in March, 1970, it was agreed, in substance, between Eldon Vaughan, acting for UCC, and Powell that in full and complete satisfaction of all claims and controversies between the parties UCC would register the Plaintiffs' UCC stock with the SEC and accelerate the remaining payments of UCC shares and cash to become due under the amended Stock Purchase Agreement of June 30, 1967?

Answer 'Yes' or 'No.'

ANSWER: *Yes*

By the term 'agreed' is meant a meeting of the minds.

If you have answered the foregoing Special Issue 'Yes', then answer the following Special Issue. Otherwise you need not answer same.

"SPECIAL ISSUE NO. 22

Do you find from a preponderance of the evidence that UCC was ready, willing and able to register the Plaintiffs' UCC stock with the SEC and to accelerate delivery of the remaining payments of UCC shares and cash to become due under the amended Stock Purchase Agreement of June 30, 1967, and would have done so, but for receiving the telegram from Powell on or about April 18, 1970?

Answer 'Yes' or 'No'

ANSWER: *Yes*

You are instructed in this connection that UCC was not required to continue performance of its agreement, if any you have found in answer to Special Issue No. 22 above after receiving the telegram from Powell on or about April 18, 1970."

Counsel Eldon Vaughan testified that he and Powell (who Murtagh concedes had authority to bind her to any agreement made with UCC) orally agreed on March 9, 1970 that if UCC would register appellants' stock and accelerate the remaining payments of stock and cash due them, appellants would release UCC from any liability and not initiate litigation against UCC. Powell denied that such an oral agreement had been made. The jury by its answer to question 21 found that the parties did agree to so settle "all claims and controversies," and there is adequate evidentiary support for this finding.

[3-5] The existence of an antecedent bona fide dispute between the parties concerning the subject matter of a subsequent settlement agreement is sufficient legal consideration for creation of an enforceable agreement. *See* El Paso County Water Imp. Dist No. 1 v. City of El Paso, 243 F.2d 927, 933 (CA5), cert. denied, 355 U.S. 820, 78 S.Ct. 26, 2 L.Ed.2d 36 (1957), and 12 Tex.Jur.2d, Compromise and Settlement §§ 5 and 6, pp. 290-92 (1960). The party claiming that a settlement agreement has been created has the burden of exhibiting that a bona fide dispute existed as to the subject matter. *See, e. g.*, Bergman Produce Co. v. Brown, 156 S.W. 1102 (Tex.Civ.App.1913, n. w. h.). The jury found appellants had established all elements requisite to their recovery from UCC for material misrepresentations and omissions and for conversion of their stock. But by its answer to question 20 the jury expressly found only that a bona fide dispute existed "as to the rights and obligations of the parties under the amended Stock Purchase Agreement." Hence, appellants contend, the answer to question 20 effectively establishes consideration for creation of a

settlement agreement barring only their breach of contract cause of action. UCC, they say, failed to carry its burden to establish an essential element for the creation of a settlement agreement adequate to bar recovery under the separate fraud and conversion claims. Even if we adopt appellants' restrictive reading of question 20 as applying to only a cause of action for breach of contract,[8] the appellants gain no ground. Rule 49(a) provides that if

> the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

UCC's responsive pleadings and the evidence at trial clearly raised an issue of whether there was a settlement agreement created to bar all of appellants' claims against UCC, and neither party raised an objection to the adequacy of question 20 to test for the existence of factual elements essential to creation of a settlement covering all of appellants' claims. Therefore, even if we were to conclude that necessary factual findings are missing in the

[8] There are reasons for reading question 20 more expansively. While appellants have characterized their suit as an action for one sum of damages for each of three separate types of injurious conduct by UCC — fraud, conversion, and breach of contract — close reading of the charge and special questions reveals that the District Court never separated the case so neatly into three parts. The fraud and conversion causes are separately identifiable, but the District Court did not ask the jury to consider also an independent breach of contract claim. Rather, considerations of what the Stock Purchase Agreement called for prevade and provide the matrix for the fraud and conversion claims which the jury was required to consider. And, by question 21, the court required the jury to find whether UCC and appellants "agreed" to settle "all claims and controversies between the parties," not just a breach of contract claim.

jury's answer to question 20, we would deem that the District Court in accord with its entry of judgment for UCC made findings that antecedent bona fide disputes existed between the parties as to whether UCC committed fraud and conversion. And such deemed findings would not be clearly erroneous on this record. *See* Fed.R. of Civ.P. 49(a) and 52(a); Williams v. Aetna Casualty & Surety Co., 239 F.2d 250, 252-253 (CA5 1956).

**[6-10]** 2. Appellants' second group of contentions concerning the settlement agreement constitute an argument that, even if a settlement agreement was created, it cannot bar their recovery for UCC's violations of the anti-fraud provisions of federal securities laws because such a settlement would be void as against public policy. The federal securities laws do not compel persons harmed by acts violating provisions of the laws to seek their remedies only through litigation. *See* Wilko v. Swan, 346 U.S. 427, 438, 74 S.Ct. 182, 98 L.Ed. 168, 177 (1953) and Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 245-246 (CA3 1968). Notwithstanding the provisions of the securities laws expressly voiding any private agreement waiving compliance with provisions of the laws,[9] settlements of claims arising from acts which are violations of the securities laws are not void as a matter of law, at least where such settlement agreements do not themselves continue the pre-

[9] § 14 of the Securities Act of 1933 [15 U.S.C.A. § 77n (1971)] provides:

"Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

§ 29(a) of the Securities and Exchange Act of 1934 [15 U.S.C.A. § 78cc(a) (1971)] provides:

"Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

cise conduct which violates the laws. *See* Cohen v. Tenney Corp., 318 F.Supp. 280, 283-285 (S.D.N.Y. 1970 and *cf.* Pearlstein v. Scudder & German, 429 F.2d 1136 (CA2 1970), cert. denied, 401 U.S. 1013, 91 S.Ct. 1250, 28 L.Ed.2d 550 (1971). But judicial hostility toward waviers of statutory rights requires that the right to private suit extended by the securities laws for alleged violations be scrupulously preserved against unintentional or involuntary relinquishment. *See* Cohen v. Tenney Corp., *supra.* Courts can scrutinize the settlement agreement to determine whether the waiver of private rights accomplished thereby is intentional. Appellants rely upon Childs v. RIC Group, Inc., 331 F.Supp. 1078, 1083 (N.D.Ga.1970), aff'd, 447 F.2d 1407 (CA5 1971), for the proposition that to support a finding of intentional waiver by settlement of a right granted private parties by the securities laws it must be specifically found that the particular statutory right was actually known. And, since no express factual finding of their actual knowledge of rights under the securities laws was made here, appellants say the settlement cannot bar their recovery for the securities fraud which the jury found.

This argument too must be rejected because of the operation of Rule 49(a). There are no request to the court that it submit a question to the jury requiring a finding of whether appellants had intentionally and knowingly waived the rights granted them by the securities laws. It then was proper for the court to rule upon that question, and we must deem that the court consistent with its judgment for UCC found that appellants intentionally and knowingly waived their statutory rights under the securities acts. We are unable to say that such a finding is clearly erroneous,

Williams v. Aetna Casualty & Surety Co., *supra*, 239 F.2d at 252-253, since the record reveals that prior to the time Powell orally agreed to settle he had retained American counsel and had been advised to sue UCC. Indeed Powell brought to the settlement meeting and showed to UCC General Counsel Vaughan prior to their oral agreement, a draft letter from Powell's American counsel threatening suit if a settlement were not reached.

[11] 3. Finally appellants challenge the operation of the settlement agreement to bar their claims by arguing that even if such an agreement was made at Powell's March 9 meeting with Vaughan, it subsequently was repudiated by UCC, or was repudiated by appellants and then rescinded by UCC's acceptance of appellants' repudiation and suspension of its performance. The settlement agreement found in question 21 expressly recounts affirmative duties required of only UCC. Question 21 does not refer to a duty on appellants to execute a release agreement, although it does specify that the settlement agreement was "in full and complete satisfaction of all claims and controversies between the parties." Appellants, therefore, make a two-prong contention, the first of which is that if there was a settlement agreement UCC repudiated it by in effect conditioning its performance of an already agreed upon matter on the acceptance of an additional term [a written release] not found by the jury (in answer to question 21) to be part of their agreement. This theory — whether considered as expressing a condition not bargained for by UCC, or if bargained for prematurely asserted because any release was only required contemporaneously with full performance by UCC — was not properly presented at trial. It

was not the subject of an interrogatory, nor did appellants request that it be. It was not covered in jury instructions, and appellants made no objection on such ground. Nor did appellants argue the theory to the jury. It surfaced for the first time in motion for new trial. Again, appellants run head on into Rule 49(a), which requires us to deem that consistent with its judgment for UCC the trial court found that UCC's demand for the release was neither unjustified nor untimely.[10]

The second prong to appellant's after-trial theory is that if Powell's telegram was a repudiation UCC "accepted" the repudiation and suspended its performance. For two reasons this lacks merit. The court instructed without objection that there was no further obligation on defendant to perform after receipt of the April 18 telegram.[11] Also, after receipt of the telegram UCC proceeded at its expense to

[10] Additionally, the evidence does not support in the slightest degree a claim that the telegram of April 18, sent by Powell to UCC, had any relation to UCC's letter of March 19 sending the release to be executed. The telegram said: "Your terms for agreement with Powell and Murtagh are not accepted." This language, the testimony of UCC, Powell and Murtagh, and the exhibits, reflect with total clarity that the telegraph was a statement by Powell of his position that he had not entered into a settlement agreement at all on March 9, a position that the jury rejected. Beginning March 9 UCC took many necessary steps toward completion of matters required of it by the March 9 agreement. At their end, Murtagh understood Powell to tell her by telephone that an agreement had been reached on March 9, and based on that conversation she sent a letter to UCC, with a copy to Powell, acknowledging her understanding and stating her intent to move forward with the agreement. Powell received his copy of her letter, called her, and told her she has misunderstood him because he had merely told her what UCC had offered and not that he had agreed to accept the offer. Then he dispatched the telegram. Upon receipt of it, Vaughan called Powell, and according to Vaughan's testimony, not controverted by Powell, Powell made no objection to the release but said the settlement was no longer acceptable because Murtagh was disturbed about the registration statement under which their shares would be registered and the way the company was being managed. There is no substantial evidence relating the April 18 telegram to the request for a release.

[11] See Restatement of Contracts § 417; Hill v. Schultz, 248 S.W.2d 535 (Tex.Civ.App.1952); American Textile Mach. Co. v. United States, 220 F.2d 584 (CA6 1955).

complete the necessary SEC registration to permit appellants to sell their stock, and after the registration was effective appellants took advantage of it by selling. Subsequently UCC delivered the remaining stock and cash. Thus appellant's complaint is that times of delivery of the additional stock and cash were not accelerated as agreed and in the interim the market price of UCC stock declined.

In the end, this case reduces itself to matters that can be simply stated. The jury found that UCC had wronged the appellants, but found also, contrary to appellants' version, that the matters between UCC and appellants were the subject of a settlement agreement. It found that UCC was ready, willing and able to perform until it received Powell's telegram of April 18 and would have performed but for that telegram. The after-trial claim that even if there was a settlement it was negated by UCC's subsequent action in calling for a written release must fail because Rule 49(a) forecloses it and, in any event, the claim wholly lacks evidentiary support. And, as we have noted, after receipt of the telegram, UCC performed a substantial part of what it had undertaken by the settlement agreement to do, although under the instructions to the jury further performance was not required of it.

Affirmed.

# APPENDIX "B"
# STATUTORY PROVISIONS

## SECURITIES ACT OF 1933

### §14

Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

## SECURITIES ACT OF 1933

### §17(a)

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly, or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or,

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

SECURITIES EXCHANGE ACT OF 1934

## §10(b)

It shall be unlawful for any person directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange —

(b) to use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

## §29(a)

Any condition, stipulation or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder or of any rule of an exchange required thereby shall be void.

FEDERAL RULES OF CIVIL PROCEDURE

## RULE 49

(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written

forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

**RULE 51. INSTRUCTIONS TO JURY: OBJECTION**

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUPREME COURT, U.S.
Supreme Court, U.S.
FILED
JUN 28 1974
MICHAEL RODAK, JR.

# In the
# Supreme Court of the United States
..... TERM, 1974

No. 73-1805

MARION MURTAGH AND WILLIAM JOSEPH POWELL,
*Petitioners*

*v.*

UNIVERSITY COMPUTING COMPANY,
A TEXAS CORPORATION, *et al*,
*Respondents*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION

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In the

# Supreme Court of the United States

..... TERM, 1974

No. 73-1806

MARION MURTAGH AND WILLIAM JOSEPH POWELL,
*Petitioners*

*v.*

UNIVERSITY COMPUTING COMPANY,
A TEXAS CORPORATION, *et al*,
*Respondents*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF FOR RESPONDENTS IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents University Computing Company, *et al*, respectfully submit this Brief in opposition to Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for The Fifth Circuit, and pray that said Petition be denied.

## STATEMENT OF THE CASE

The following statement corrects certain inaccuracies contained in, and supplies facts omitted from, Petitioners' Statement of the Case. Hereinafter, references in this Brief to "Respondent" should be understood to refer to University Computing Company.

Petitioners' suit, though pigeon-holed by Petitioners' pleadings under various theories of recovery including breach of contract, conversion and fraud, turns upon a single central issue: The nature of the stock acquired by Petitioners from Respondent as consideration for the sale of Petitioners' companies to Respondent. Petitioners claim that they were to have received freely marketable stock under the acquisition agreement, and they base that claim upon alleged representations of Respondent's employees to that effect in the negotiations leading up to the execution of that agreement. Petitioners claim that the stock they received was *not* freely marketable by reason of restrictions arising out of the Securities Act of 1933, and that such fact shows both a breach of contract and a misrepresentation constituting actionable fraud. Finally, Petitioners contend that Respondent's acts in treating the stock as not freely marketable by reason of restrictions arising out of the Securities Act of 1933, constituted a conversion of the stock.

Respondent has denied Petitioners' allegations and has contended that those allegations are not actionable at law, that Petitioners' measure of damages is wholly improper

and that all of Petitioners' claims have been extinguished by virtue of a compromise and settlement agreement between the parties.

In response to special interrogatories submitted pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, the jury found that in March of 1970 a bona fide dispute existed between Petitioners and Respondent with respect to the stock delivered to Petitioners under the acquisition agreement, and that in that month the parties entered into an agreement "in full and complete satisfaction of all claims and controversies between the parties" whereby Respondent agreed to register Petitioners' stock with the Securities and Exchange Commission and to accelerate the remaining installment payments of stock and cash due under the acquisition agreement (R. 1568).

Thereafter, Respondent proceeded to take appropriate action to register Petitioners' shares and to accelerate delivery of the remaining installments of cash and shares payable under the acquisition agreement. However, before Respondent could fully perform its promise in the compromise and settlement agreement, Petitioners advised Respondent that the compromise and settlement agreement was no longer acceptable to Petitioners and that Respondent would hear from their attorneys in the near future (R. Vol. 4, p 80). The only explanation given by Petitioners for their repudiation of the compromise and settlement agreement was that Petitioners had become disturbed about the way the company was being managed and did not want to go through with the compromise and settlement agreement

(R. 1267). Notwithstanding Petitioners' repudiation of the compromise and settlement agreement, Respondent continued its efforts with respect to registration of all of Petitioners' stock, and such registration was accomplished on May 6, 1970, and was declared effective on May 27, 1970 (R. 1356-57). Petitioners took advantage of such registration by selling their stock after May 27, 1970 (R. 1374-77, 1368). Accelerated delivery of the remaining installments of stock and cash was not attempted in view of Petitioners' indication that such terms would not be honored, but the jury found that Respondent was ready, willing and able to do so, and would have done so had Petitioners not repudiated the compromise and settlement agreement (R. 1569). Before judgment was entered in this case, Respondent had delivered all of such remaining stock and cash to Petitioners in accordance with the acquisition agreement.

Petitioners have intimated in their Statement of the Case that they repudiated the compromise and settlement agreement because Respondent had asked them to sign a release in connection with the settlement. There is absolutely no evidentiary support in the record for this statement, as the United States Court of Appeals for the Fifth Circuit specially noted at length in its Opinion (Appendix A to Petition for Writ of Certiorari, p 44).

After the close of testimony in this jury trial, the attorneys and Judge of the Trial Court worked in chambers for approximately two days on the preparation of a charge in the form of special interrogatories with explanatory instruc-

tions. During this work session many objections and suggestions were made by both parties to the form and substance of proposed special interrogatories, but none of those remarks were recorded and none appear in this record. After hearing all of those objections and suggestions, the Charge was finally reduced to writing and the attorneys were advised to make such formal objections and exceptions to the final Charge as they might desire by dictating them to the court reporter in the absence of the court (R.1628). *The attorneys for Petitioners made no objection to proceeding in this fashion.* The attorneys for both parties dictated their objections to the Charge to the court reporter as instructed, and the case was then submitted to the jury. On July 6, 1971, the jury returned its verdict (R.1556).

Nearly six months after the jury verdict, Petitioners filed pleadings designated as "Plaintiffs' Objections and Exceptions to the Charge of the Court" (R.1598). Because these pleadings contained many matters which had not been included in Petitioners' previous objections to the Charge dictated to the court reporter prior to submission of the case to the jury (R.1660), Respondent filed its Motion to Strike the pleadings (R.1651). The Trial Court sustained Respondent's Motion to Strike and ordered that only the objections to the Charge previously dictated by Petitioners to the court reporter would be considered as having been timely filed (R.1667).

Thereafter, on July 5, 1972, the Trial Court entered judgment that Petitioners take nothing against Respondent. Motion for New Trial was overruled and Notice of

Appeal was timely filed. Responding to Petitioners' Motion for Finding of Facts (R.1670), the Trial Court declined to find that all or substantially all of the objections to the Charge filed by Petitioners six months after jury submission had been made in the unreported work session wherein the Charge was prepared (R.1628). Respondent also does not agree that the stricken objections had all been made in the informal work session, as represented by Petitioners (Petition for Writ of Certiorari, p 9).

## REASONS WHY THE WRIT SHOULD BE DENIED

### *1. Procedural Due Process*

Petitioners complain that pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, the Court of Appeals deemed certain fact findings against Petitioners in accord with the judgment for Respondent. Petitioners argue that the Court of Appeals should not have applied Rule 49(a) in this case since many of their objections to the Charge had been stricken by the Trial Court as untimely made. While Respondent does not agree with Petitioners that the Trial Court deprived Petitioners of procedural due process in these proceedings, particularly in view of Petitioners' failure to object to the Trial Court's actions at the time, Respondent submits that the Trial Court's actions have no effect on the decision of the Court of Appeals affirming the judgment, since none of the facts deemed to have been found in accord with the judgment were requested by Petitioners to be presented to the jury in either their timely or untimely objections to the Charge.

The deemed findings in question are (1) that the request by Respondent that Petitioners execute a release in connection with the compromise and settlement agreement was not a repudiation of that agreement, (2) that Respondent had not elected to rescind the compromise and settlement agreement after Petitioners' repudiation thereof, and (3) that Petitoners were aware of their rights under securities laws prior to compromising and settling their claims arising thereunder. A review of the stricken "Plaintiffs' Objections and Exceptions to the Charge of the Court" (R.1598) will reveal no request for submission to the jury of these fact issues. Likewise, no such request was made by Petitioners in their objections dictated to the court reporter at the close of the evidence (R. 1653). Rather, the only references made to any of these issues in either of Petitioners' two submissions of objections to the Charge related to Petitioners' objection to submission of the entire theory of compromise and settlement to the jury on the grounds that Respondent, as a matter of law, had repudiated the agreement by requesting execution of a release (R. 1605, Objection XIV; R. 1606, Objection XVI; R. 1612, Objection XXIX; R. 1613, Objection XXXI; R. 1620, Objection XLV). Certainly this was not a request for submission to the jury of the issue of repudiation; rather it was a statement that the issue was established as a matter of law. At no point in either submission of objections to the Charge did Petitioners make reference to either of the remaining fact issues deemed found in favor of Respondent.

In summary, Petitioners' complaints as to procedural due process, if any they have, relate to issues and matters

which have no bearing on the decision in this case; therefore, no question in this respect has been presented which merits this Court's attention.

### 2. *Alleged Election to Rescind Compromise and Settlement Agreement by Respondent*

Petitioners argue that Respondent intended to and did rescind the compromise and settlement agreement upon Petitioners' repudiation thereof, and that, therefore, Respondent cannot claim the defensive benefit of that agreement. This argument first appeared in this case after the case had been submitted to the jury. Undoubtedly, the issue of Respondent's intention with respect to rescission is one of fact. Petitioners failed to request submission of this fact issue to the jury and failed to object at any time to the absence of such fact issue in the Charge. Accordingly, the Court of Appeals correctly deemed a finding against Petitioners on this issue in accord with the judgment against Petitioners.

The evidence in favor of this deemed finding is overwhelming. Petitioners state at page 12 of their Petition for Writ of Certiorari that "under the undisputed facts in our case Respondent elected to rescind the agreement and cease performance under it . . . ." Petitioners simply ignore the facts in this record that, to the contrary, Respondent has considered the compromise and settlement agreement in force despite Petitioners' attempted repudiation, and, in fact, continued performance of that agreement to the extent that Petitioners' cooperation was not required.

Under the terms of the compromise and settlement agreement Respondent was to register all of Petitioners shares with the Securities and Exchange Commission and was to accelerate delivery to Petitioners of certain shares and cash not then due under the acquisition agreement. The commitment of Respondent in this regard was no small matter, for there was evidence that a registration of shares with the Securities and Exchange Commission could involve between $10,000 and $50,000 of accounting fees, legal fees, printing and reproduction fees, time of officers and directors, etc. (R. 1356-1357). Prior to Petitioners' repudiation of the compromise and settlement agreement, Respondent had initiated the appropriate action to register shares as required by that agreement. Subsequent to Petitioners' repudiation of the compromise and settlement agreement, Respondent continued its efforts to register Petitioners' stock, and on or about May 6, 1970, a registration statement covering the stock of Petitioners was filed with the Securities and Exchange Commission (R. 1356-1357). In this connection on May 7, 1970, Respondent's attorneys advised Petitioners by letter that:

> *"in accordance with the agreement between [Respondent] and each of you dated March 9, 1970* [Respondent] filed with the Securities and Exchange Commission yesterday, May 6, 1970, its Registration Statement No. 2-37320, which registers 39,138 shares owned by Miss Murtagh and 25,675 shares owned by Mr. Powell . . . We expect that the Securities and Exchange Commission should finish processing the Registration Statement within thirty days. As soon as

> it has been processed and declared effective, we will promptly notify you, and after that time you may sell any of your registered shares . . . (R.Vol. 4, p404) (Emphasis added)

Subsequently, on May 27, 1970, the Securities and Exchange Commission declared the Registration Statement effective and the stock was thereafter freely marketable (R. 1374-75). Petitioners took advantage of such registration by selling their stock after May 27, 1970 (R. 1374, 1375). Accelerated delivery of the remaining installments of stock and cash was not attempted in view of Petitioners' indication that such terms would not be honored, but before judgment was rendered in this case, Respondent had delivered all of such remaining stock and cash to Petitioners in accordance with the time schedule set forth in the acquisition agreement.

Thus, it appears that Petitioners' statement that Respondent discontinued its performance under the compromise and settlement agreement is plainly contrary to the direct evidence. Not only did Respondent continue the expensive process of registering Petitioners' shares, but in advising Petitioners of that registration, reference was made to the compromise and settlement agreement as if it were still in force and effect. Petitioners thereafter took full advantage of the compromise and settlement agreement that they had attempted to repudiate on April 18, 1970. This evidence shows the clear intention of Respondent to consider the compromise and settlement agreement in full force and effect notwithstanding Petitioners' repudiation.

Petitioners argue that it should be held as a matter of law that Respondent elected to rescind the compromise and settlement agreement by failing to accelerate delivery of the remaining installment of stock and cash to become due under the acquisition agreement. Petitioners further argue that the Trial Court erroneously instructed the jury that Respondent was not required to continue performance under the compromise and settlement agreement after Petitioners' repudiation thereof. Petitioners simply ignore the applicable rule of law. The law is settled that upon repudiation of a contract by one party, the other party may discontinue its performance until withdrawal of the original repudiation. The rule is illustrated in a case having facts almost identical to those presented here. In *American Textile Machine Corp. v. United States*, 220 F.2d 584 (6th Cir. 1955), the plaintiff sought to avoid a settlement agreement on the same grounds now advanced by Petitioners herein, i.e., that after plaintiff's repudiation of the settlement agreement, the defendant discontinued further performance. In that case, as in this case, the plaintiff telegraphed the defendant that the agreement was no longer acceptable. Defendant thereafter failed to make certain payments of cash required under the original settlement agreement. In holding the settlement agreement to have been a complete bar to recovery by the plaintiff, the Circuit Court said:

> *Further performance, or tender of further performance, was not required after that date, since at that time Appellee had given unequivocable notice that it had rescinded the contract.*

> No tender is necessary when a contract has been definitely repudiated by the other party (citations).
>
> We are of the opinion that the District Judge was in error in not giving effect to the compromise settlement agreement, even though it had not been performed. *Unless shown that it was not a valid contract or that it has been breached by the appellant as distinguished from non-performance, it stands as a bar to the prosecution of the present action.* (Page 589)(Emphasis added).

The same result is required under Texas law upon the same reasoning. *Pacific Employers Insurance Company v. Brannon*, 242 S.W.2d 185 (Tex. 1951) (also involving an unperformed, but unbreached, settlement agreement).

In *Blackman v. Crandell*, 258 S.W. 1073 (Tex. Civ. App. 1924) *dism'd.*, seller and buyer entered into a contract for the sale and purchase of ten cars of potatoes. Subsequently, the buyer wholly repudiated the contract. Seller then waited until buyer's time for performance and sued for the profit on the whole contract as if it had not been rescinded after buyer's repudiation. The buyer attempted to defend on the grounds that seller had not delivered the cars of potatoes, and by that inaction had elected to rescind the contract. The appeals court rejected this defense in these words:

> Since Appellees chose to wait until the stated time for performance, *they were excused from the necessity of performing on their own part unless appellant who had repudiated the contract, withdrew his repudiation.* (page 1076)(Emphasis added)

And in *Myers v. Jefferson Standard Life Insurance Company*, 271 S.W. 217 (Tex. Civ. App. 1925) *aff'd.* 284 S.W. 216 (Tex. 1926), an insurance company wrongfully claimed a forfeiture of a policy. The insured thereafter failed to tender premiums. When the insured died, the insurance company refused to pay on the policy, claiming that the failure of the insured to make further premium payments was an election to rescind the insurance contract. The court held that the insurance contract had not been rescinded:

> . . . The insured was excused from rendering further payments of premiums after notification of the forfeiture of the policy.
>
> 'Payment or tender of premium is not necessary where the insurers have already declared the policy forfeited or upon any act which is tantamount to declaration on their part that they will not receive it if tendered.' (Page 220)

To the same effect is *Young v. Watson*, 140 S.W. 840 (Tex. Civ. App. 1911) *err. ref.*

> One party to a contract is not required to tender performance when the other party thereto has declared that he will not accept such performance or will not do that which he had agreed to do in compensation or return for such performance. (Page 842)

Under these authorities Respondent was fully justified in withholding performance under the compromise and settlement agreement until Petitioners withdrew their repudiation of that agreement, and the Trial Court's instruction to that effect was not error.

### 3. *Alleged Repudiation by Respondent of Compromise and Settlement Agreement*

Petitioners argue that Respondent attempted to add a more burdensome term to the compromise and settlement agreement when it requested Petitioners to execute a release, and that such attempt constituted a repudiation of the agreement which was accepted by Petitioners. This argument also appeared for the first time in this case after submission of the case to the jury. The questions of whether Respondent's request added a new term to the agreement and whether Petitioners intended to rescind the agreement by virtue of that request are pure fact issues. At no time did Petitioners either request submission of these issues to the jury or object to the failure to include such issues in the Charge. Accordingly, the Court of Appeals correctly deemed findings on these issues against Petitioners and in accord with the judgment for Respondent (Rule 49(a)).

Aside from these procedural barriers to assertion of this point, Petitioners' argument in this respect goes against the evidence and the law. While Petitioners state that the general releases submitted by Respondent to Petitioners for signature contained terms more onerous than those of the oral agreement of compromise and settlement, Petitioners do not state for this Court just what terms were contained in those releases which were so onerous. As a matter of fact, examination of the release (R.Vol.4, p 76) reveals that not a single term of the compromise and settlement agreement

is included in that release. Rather, it sets forth the general language found in most releases regarding discharge of all claims, but makes no attempt to specify terms. Petitioners simply misstate the facts in this regard.

But Petitioners argue further that submission of the releases itself made the compromise and settlement agreement more onerous than originally agreed upon. The jury found Respondent and Petitioners had entered into an agreement "in full and complete satisfaction of all claims and controversies between the parties." This finding constituted a determination by the jury that Petitioners, in fact, had agreed to release Respondent from all liability, whether Petitioners executed formal releases or not. The contractual burden upon Petitioners was not increased by the tender for signature of releases which added no new terms to the agreement already entered into.

The law is settled that a tender of a release following the formation of an oral agreement to compromise and settle all controversies between the parties does not affect such oral agreement and does not constitute an additional condition to such agreement. *Good v. Pennsylvania Railroad Company*, 384 F.2d 989 (3d Cir. 1967); *Main Line Theaters, Inc. v. Paramount Film Distributing Corp.*, 298 F.2d 801 (3d Cir. 1962), *cert. den.* 370 U.S. 939 (1962). *Cf., Aetna Insurance Company v. Sanchez*, 391 S.W. 2d 184 (Tex. Civ. App. 1965).

Moreover, the evidence is wholly against Petitioners' position. Respondent's witness, Eldon Vaughan, testified

that one term of the settlement agreement was that Petitioners would deliver releases of liability (R 1249, 1251). Moreover, Petitioner Powell testified that Mr. Vaughan had said at the settlement meeting: "I want a letter saying there would be no litigation" (R.763). Petitioner Murtagh testified that Petitioner Powell told her shortly after the settlement meeting that Respondent wanted a letter from the Petitioner stating that they would not enter into litigation (R.505,506). In fact, Petitioner Murtagh wrote such a letter shortly after the settlement meeting which stated: "I confirm that I will not proceed with any litigation against UCC if the above arrangement is implemented." (R.Vol.4, p 79). Apparently, Petitioners hope to convince the Court that although Petitioners knew that they were required by the settlement agreement to execute and deliver letters reciting that they would not sue Respondent, they did not agree to execution of releases. The absurdity of such a position is clear.

Not only have Petitioners failed to show how submission of the releases for execution amounted to a repudiation by Respondent, but there is absolutely no evidence, contrary to the representation made in Petitioners' Brief, that Petitioners accepted the so-called repudiation and elected to rescind the agreement for that reason. A review of the record will reveal that neither of the Petitioners testified that they objected to execution of the releases. Neither did they state that the releases contained any recitation which was objectionable to them. Neither did they ever make a complaint to Respondent about tender of the releases or

the form thereof (R.1267-1269). There is not one shred of testimony from either of the Petitioners that their telegram of April 18, 1970 (R.Vol.4, p 80), wherein they rejected the compromise and settlement agreement, was sent as a direct response to the submission of the releases for execution. In fact, the only direct evidence in this record explaining why Petitioners' repudiation telegram of April 18, 1970 was sent is that Petitioner Murtagh had become disturbed about a prospectus that had been sent to her, or about the way the company was being managed (R. 1267). In other words, there is no evidence that Petitioners regarded the submission of the release as a repudiation of the contract, and there is no evidence that in response to that alleged repudiation they elected to rescind the contract. This complete lack of evidence of connection between the tender of the release and Petitioners' repudiation of the compromise and settlement agreement was specially noted by the Court of Appeals in its Opinion (Appendix A to Petition for Certiorari, p 44).

### 4. *Settlement of Federal Securities Fraud Actions*

Plaintiffs cite §14 of the Securities Act of 1933 (the "1933 Act") and §29(a) of the Securities Exchange Act of 1934 (the "1934 Act") for the proposition that the oral agreement of compromise and settlement made by the parties hereto is against public policy and cannot be enforced. The provisions to which Petitioners refer contemplate only conditions, stipulations or provisions to waive prospective violations of the 1933 and 1934 Acts. The provisions certainly were not intended by Congress to pro-

hibit the settlement of existing controversies which arose out of completed and past violations of the 1933 or 1934 Acts.

This Honorable Court in its decision of *Wilko v. Swan*, 346 U.S. 427 (1953), recognized the distinction between pre-controversy and post-controversy stipulations when it considered application of §14 of the 1933 Act. In *Wilko* the plaintiff brought action against the partners in a securities brokerage firm under §12(2) of the 1933 Act, this section being essentially a counterpart of §10(b) of the 1934 Act. The defendants moved to stay the trial until plaintiffs submitted to arbitration as required by the margin agreement entered into between the parties before occurrence of the transaction which was the subject of the suit. This Court held that the agreement to arbitrate future disputes was void with regard to plaintiffs' cause of action under the 1933 Act, since it had the effect of prospectively waiving the provisions of that Act providing for a judicial forum. Mr. Justice Reed's majority opinion stressed the element of prospective waiver:

> When the security buyer, *prior to any violation of the Securities Act*, waives his right to sue in court, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary. (p. 187) (Emphasis added)

> By the terms of the agreement to arbitrate, petitioner is restricted in his choice of forum *prior to the existence of a controversy. While the Securities Act does not require petitioner to sue, a waiver in advance of a controversy stands upon a different footing.* (p. 188) (Emphasis added)

Unquestionably the Court recognized a distinction between pre-controversy and post-controversy waivers. The intimation is that when both sides are equally apprised of the facts, there is no need for a rule protecting the investor. See also, *Junker F. Midterra Associates, Inc.*, 49 F.R.D. 310 (S.D.N.Y. 1970).

Mr. Justice Jackson in his concurring opinion in *Wilko* said what was left unsaid in the majority opinion when he suggested that an arbitration agreement entered into *after* a controversy has arisen would not be void under §14 of the 1933 Act. This suggestion became an express holding in *Moran v. Paine, Weber, Jackson & Curtis*, 389 F.2d 242 (3rd Cir. 1968), involving a suit under Rule 10(b)-5 subsequent to an arbitration award which the plaintiff considered unsatisfactory. The Third Circuit refused to find that §29a of the 1934 Act voided an arbitration agreement entered into between the parties *after* the Rule 10(b)-5 violation was discovered. Rather the court ruled that the arbitration and award was a complete defense to the plaintiff's action since the plaintiff voluntarily agreed to that method of resolution of the controversy. The analogy of the *Moran* situation to that now before the Court is obvious. If §29a is inapplicable to an agreement to submit

an existing controversy to arbitration, then it is inapplicable to an agreement to resolve an existing controversy between the parties themselves.

The distinction between pre-controversy and post-controversy settlement was acknowledged in *Cohen v. Tenney Corp.*, 318 F.Supp. 280, 284, *on motion for reargument* (S.D.N.Y. 1970), a decision cited by Petitioners at page 22 of their Petition for Certiorari. The Petitioners failed to tell this Court that upon reargument the court in *Cohen* completely reversed its prior holding that releases could not be an affirmative defense, and stated instead that:

> Since the 1933 Securities Act does not require persons aggrieved by violations of its provisions to sue, this general release, purporting to settle an already ripened controversy is not by its terms void as a matter of law. (p. 284) (citing *Wilko v. Swan, supra).*

The other decision cited by Petitioners, *Pearlstein v. Scudder,* 429 F.2d 1136 (2d Cir. 1970), also fails to support the proposition that a Securities Act claim cannot be settled. In that case the parties entered into a settlement agreement wherein one party, a stock broker, agreed to permit payment over an extended time of the purchase price of securities previously purchased by the other party, who had been unable to pay the total of such purchase price on the statutory settlement date. The court there held that the extension by the stock broker of additional time within which to pay the stock purchase price was an extension of credit prohibited by the securities laws. The

settlement agreement was an agreement to violate the securities laws in the future, and was clearly an attempt to waive future compliance with the securities laws. The decision was, as stated in *Liuni v. Cover,* Civ. No. 38375 (S.D.N.Y., March 24, 1972), "simply a holding that settlements which, by their very terms provide for further violations of the securities laws, are void under §29(a)."

The court in *Liuni* expressly held that releases and settlements of ripened violations of the Securities Acts are not void. The court had this to say:

> It was the contention of the Plaintiffs on argument, and alleged in the amended complaint, that the releases are null and void because they were made in violation of §29(a) of the 1934 Act and against public policy. Both of these contentions are premised upon erroneous conclusions of law.
>
> Public policy has been to encourage settlements and compromises freely and voluntarily reached by the parties to a controversy. Following the threat of the filing of a complaint, there definitely was a controversy as to the existence of liability of [defendants] on their loan agreement and the money evaluation of that liability if it were found to exist. I find no authority — Congressional enactment or judicial decision — which forbids the approval of settlement of Regulation U controversies.

A statute similar to §14 and §29a of the 1933 and 1934 Acts is §5 of the Federal Employers' Liability Act (45 U.S.C.A. §55):

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void:. . .

In *Callen v. Pennsylvania R. Co.*, 332 U.S. 625 (1948), this Court held that this statute did not make void a post-controversy release. The Court said:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversy exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation. (Page 298-99)

It appears inescapable that the analogy of *Callen* disposes of Petitioners' position as to the effect of §14 and §29a of the 1933 and 1934 Acts. In fact, *Callen* was cited in *Wilko* for the proposition that ". . . the Securities Act does not require petitioner to sue . . ." (p. 188)

Petitioners further argue that there are no jury findings to the effect that Petitioners "were informed of the particular statutory rights afforded them by the Securities Acts" and, therefore, any waiver by them of their rights was ineffective under §14a and §29a. In support of this proposition Petitioners cite two cases which involve waivers, as

opposed to settlement agreements. In each of those cases the act said to have constituted the waiver was committed without knowledge on the part of the plaintiff of the *facts* constituting a violation of the Securities Acts. In *Royal Air Properties, Inc. v. Smith,* 333 F.2d 568 (9th Cir. 1964), the plaintiff bought stock from an officer of Royal Air Properties, Inc. who failed to disclose to plaintiff the fact that the prior chief executive officer of the company had resigned as a director and had demanded repayment of a substantial loan he had made to the company. Plaintiff did not learn of this demand for repayment until *after* he had done the acts which defendants claimed constituted a waiver. In *Childs v. Ric Group, Inc.,* CCH Fed. Sec. Law Rep., §93,333 (D.C. Georgia 1970), defendants purchased the stock of plaintiffs without advising plaintiffs that merger negotiations were in progress affecting the company. Plaintiffs did not actually learn of the negotiations until *after* they had sold their stock to defendants, which was long after the purported waiver. The language in *Childs* and *Royal Air,* which has been lifted by Petitioners for the proposition that one must be informed as to the statutory provisions of the Securities Acts before one can settle claims arising out of those Acts, is related solely to ignorance of the facts and not to ignorance of the law. A close reading of these cases will reveal that the courts said nothing about what knowledge of the statutory provisions is required before a waiver or settlement will be recognized. It is unfortunate that *Childs* used the particular language quoted by Petitioners for its does appear to be directed to knowledge of the statutory provisions, as opposed to the

facts comprising a violation. However, a reading of this language in the context of the rest of the *Child's* opinion shows that the court had no intention whatsoever of stating that knowledge of the statutory provisions is required. Petitioners simply lifted this language out of context and now seek to establish an unprecedented rule with respect to compromise and settlement agreements.

It cannot be disputed in this case that Petitioners were fully informed as to the facts which comprised the alleged violation of the Securities Acts. Further, there is sufficient evidence in the record to indicate that not only did they know all of the facts, but they knew that such facts comprised violations of the Securities Acts. Petitioners' own letters to Respondent claimed that misrepresentations had been made to them with respect to the stock they would receive (R.Vol.4, p 68-71). One of these letters, Plaintiffs' Exhibit 30, was a demand letter prepared by Petitioners' attorneys, a Wall Street firm in New York City. Petitioner Powell testified that in February, 1970, he began talking to his Bahamian attorneys with respect to American securities law (R. 636). He further testified that those attorneys put him in touch with attorneys in New York City who were acquainted with "American stock laws" (R. 635). The Wall Street law firm acquainted with the American securities law advised Petitioners to sue Respondent (R. 638) and drafted Plaintiffs' Exhibit 30 which accused Respondent of "material misrepresentations." Petitioner Powell testified that this same law firm advised him that his shares were restricted under the

Securities Acts (R. 675-676). Shortly after the settlement agreement had been made between Respondent and Petitioners, Petitioners again consulted with these New York lawyers (R. 649) and suit was initiated soon thereafter claiming Securities Act fraud. It is inconceivable under this evidence that Petitioners had no knowledge of their rights under the Securities Acts. It is submitted that without violating attorney-client privilege the evidence could not have been more explicit in this regard. Petitioners had consulted with experts in the area of American securities law and had thereafter claimed "material misrepresentations." Contrary to Petitioners' statement in their Petition for Certiorari, there was substantial evidence of knowledge by Petitioners of their rights under these Securities Acts.

This is another of Petitioners' arguments that appeared for the first time after the case had been submitted to the jury. Undoubtedly Petitioners' knowledge of the securities laws at the time of making the compromise and settlement agreement was a fact issue. Petitioners at no time requested submission to the jury of this issue of fact. Accordingly, Petitioners waived a jury trial with respect to this issue of fact, and the take nothing judgment constituted a deemed finding against Petitioners on such issue (Rule 49(a), Fed. Rules of Civ. Proc.). Moreover, Petitioners at no time objected to the failure to include a special issue or instruction in these respects in the Charge, and may not now assign as error that to which they failed to make objection as required by Rule 51, Federal Rules of Civil Procedure.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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## CERTIFICATE

This is to certify that a copy of Brief For Respondents In Opposition was this, the 26th day of June, 1974, served upon Johnson, Bromberg, Leeds & Riggs by mailing the same to them at the Fifteenth Floor, Two Eleven North Ervay, Dallas, Texas, 75201.

HAROLD HOFFMAN